

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6012

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee-Appellant,

-against-

PARKLANE HOSIERY CO., INC.
HERBERT N. SOMEKH,

Defendants-Appellants-Appellees.

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS-APPELLEES
PARKLANE HOSIERY CO., INC. AND HERBERT N. SOMEKH

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This case grew out of a merger consummated in October 1974 whereby the corporate defendant was returned to its status as a private company. This appeal seeks correction, by reversal, of the Judgment below which was based upon a decision of the United States District Court for the Southern District of New York (Duffy, J.) that a proxy statement -- the precursor to the merger -- was defective in three respects. As a consequence, the District Court directed that all public

filings of the corporate defendant filed with plaintiff since September 1974 be amended, including filings which had not even been before, or considered by, the District Court.*

Issues Presented

1. Where a corporate merger has been consummated pursuant to the laws of the State of New York and the validity of the merger is not in issue, is the purpose for the merger a relevant question under the federal securities laws in respect of shareholders who will not retain any interest in the surviving corporation?

* While all other relief sought by plaintiff was denied, the gravity of the decision below extends beyond the relief granted. As the Opinion below notes (A8**), this action is one of five pending actions regarding the merger. One is an appraisal proceeding brought under the laws of the State of New York and is being conducted pursuant to an Order of the New York Supreme Court, Nassau County (Index No. 1041/75). In two of the three remaining actions, private litigants have substantially parroted plaintiff's complaint and are attempting, by way of summary judgment, to use the decision below as the basis for seeking damages or rescission of the merger. In both cases plaintiffs have demanded jury trials.

In one of the said actions, Shore v. Parklane Hosiery Company, Inc., et al., Docket No. 77-7163, an appeal to this Court is presently pending from the denial, by the District Court (Wyatt, J.), of a summary judgment motion the plaintiff made on the basis of the decision below. The denial was based on the ground that in this case no right to a jury trial existed, whereas Shore is to be tried by a jury.

The appeal in Shore, where, in addition to the defendants here, there are 12 named defendants, presents the question whether the two defendants here are collaterally estopped from relitigating, in a trial by jury, the issues decided below where there was no right to a jury trial.

** Reference to pages in the Appendix will appear as follows: "(A)."

2. Where a proxy statement discloses that, as a result of a corporate merger, the minority shareholders will not retain any interest in the surviving corporation and the majority shareholders "will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow" of the surviving corporation, did the District Court erroneously find that there was an undisclosed purpose to benefit personally the majority shareholder?

3. Where a proxy statement discloses (a) that an offer for the cancellation of a certain lease had been withdrawn, (b) that there were then no negotiations and (c) that the corporation could not determine if another offer would be made, did the District Court erroneously find that amendment of the proxy statement was necessary to disclose a subsequent discussion which the corporation had no reasonable grounds to believe would result in another offer being made?

4. Where a proxy statement disclosed two independent appraisals of the value of a corporation's common stock in connection with a merger, did the District Court erroneously find that it was necessary to disclose that one of the two appraisers was unaware of three items of information, (a) the first of which the appraiser testified he was aware of, (b) the second of which was hypothetical and not a fact, and

(c) the third of which the appraiser testified would not have been taken into account in the appraisal?

5. Did the District Court misapprehend and misapply the test of materiality in finding violations of the federal securities laws?

6. Did the District Court erroneously conclude that there were knowing violations of the federal securities laws?

7. Did the District Court erroneously conclude that § 17(a) of the Securities Act of 1933 had been violated where there had been no "offer or sale of any securities" by defendants and there was no defrauded purchaser?

8. Is a judgment which directs the filing of amendments to all public filings made or caused to be made by defendants from in or about September 1974 improper, where not all, but only one of such filings and part of another, were before the District Court?

9. Is a judgment which directs that amendments be made to public filings to reflect "among other things," three findings of the District Court, improper and insufficient in that it is unduly vague and unspecific?

It is respectfully submitted that the first issue should be answered in the negative and that each of the other issues should be answered in the affirmative.

Statement of the Case

Defendants Parklane Hosiery Co., Inc. ("Parklane") and Herbert N. Somekh ("Somekh") appeal (a) from a Judgment and Order entered March 9, 1977, as amended nunc pro tunc by an Order entered March 24, 1977 (the "Judgment") (A30) as directs Parklane to file, and Somekh to cause to be filed, amendments to all public filings made or caused to be made by them since in or about September 1974, and (b) from the findings of fact and conclusions of law upon which such direction was based.

The Judgment followed an Opinion and Order of the District Court (Duffy, J.) dated November 9, 1976 (the "Opinion") (A4). The Opinion, reported at 422 F. Supp. 477, was entered after a four-day trial which was concluded June 7, 1976.

The Judgment was not entered until March 9, 1977. On the very next day, defendants filed their Notice of Appeal.* Plaintiff Securities and Exchange Commission ("SEC") then requested the District Court to amend

* The lapse of some four months between the November 9, 1976 Opinion and the filing of this appeal on March 10, 1977 resulted from the fact that the District Court, having failed to enter a judgment pursuant to Rule 58, Fed. R. Civ. P., refused to do so until this Court, upon an application of defendants, opposed by plaintiff, directed that a judgment be entered.

the Judgment as originally filed to recite the denial of certain relief the SEC had sought. The request was granted and defendants filed an Amended Notice of Appeal to limit the portions of the Judgment, as amended, from which they appeal (A595). The SEC has cross-appealed from the partial denial of relief sought (A596).

By an order dated April 4, 1977, this Court, upon defendants' motion, stayed the Judgment pending determination of the appeals therefrom.

Nature of the Case

This case grew out of a merger on October 14, 1974, pursuant to the laws of the State of New York, between Parklane and New PLHC Corp. ("Newco"), whereby Parklane returned to its status as a private company (A580). The following month, the SEC commenced a private investigation. It was carried on for approximately one and one-half years (A451). Finally, in May 1975 the SEC commenced the action below by the filing of a complaint (A580). Simultaneously, the SEC brought on a motion, to answer to show cause, seeking the same injunctive and ancillary relief sought in the complaint (A5).

Defendants thereupon moved, with a supporting affidavit (A597), for an order, pursuant to Rule 12(b)(6),

Fed. R. Civ. P., dismissing the complaint for failure to state a claim upon which relief can be granted (A597). The motions were fully briefed by both sides. The District Court, without deciding either of the two motions, directed that a hearing be held commencing June 2, 1976. The hearing continued on June 3 and 4 and was concluded on June 7, 1976. At the outset of the hearing, the SEC moved to consolidate it with a trial on the merits (A36). Upon the conclusion of the hearing, defendants concurred in the consolidation (A5).

Neither the complaint nor the SEC's motion challenged the validity of the merger or the fact that Parklane, by the merger, became a private company (A8). Rather, the SEC claimed, and the District Court found, that the related proxy statement dated September 24, 1974 (the "Proxy Statement") (A504) was deficient in the following three respects:*

First, the complaint claimed, and the District Court found, that the Proxy Statement did not disclose the purpose for the merger, though the purpose for the merger was irrelevant, as a matter of law, and, in any event, was adequately disclosed. While

* The claims made were purportedly based upon § 17(a) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77q(a), §§ 10(b), 13(a) and 14(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a), and certain rules promulgated thereunder (A580).

the District Court found non-disclosure in this regard, it did not consider, and did not find, such non-disclosure to be material.

Second, the SEC claimed, and the District Court found, that the Proxy Statement should have been amended to disclose a meeting concerning the cancellation of a certain lease between the Federal Reserve Bank of New York ("FRB"), as lessor, and Parklane, as lessee, of certain store premises, though on the basis of that meeting, Parklane had no reasonable grounds for believing that any agreement would be reached for cancellation of the lease and that, as a matter of law, no such amendment was necessary.

Third, the SEC claimed that two independent appraisals of Parklane's common stock were disclosed in the Proxy Statement allegedly without disclosing that the appraisers were not provided sufficient information. At trial, the SEC sought to prove the claim in respect of one, but not the other, appraiser. The District Court found that the one appraiser was unaware of three items of information, though the record shows that in respect of such items the appraiser

was not unaware of any fact which he deemed relevant.*

We turn now to an analysis of the facts in the record. Many of them, which bear directly upon the question of the validity of the findings made, do not appear in the Opinion below; others, it is respectfully submitted, were demonstrably misconstrued by the District Court. In sum, as will now be seen, the record negates the claims of the SEC and the findings and conclusions of the Court below.

The Facts

Parklane is engaged in the retail business of selling women's hosiery products and related items through approximately 400 outlets (A517). In December 1968, Parklane made a public offering of its common stock (A509). After the public offering, Somekh, the president of Parklane, and others affiliated with him retained effective control of Parklane (A5-6, 506-507).

* Apart from errors of fact and law upon which the Judgment was based, the Judgment was patently defective in directing that "all public filings" of Parklane since in or about September 1974 be amended (A30-31), in spite of the fact that all such filings had not even been considered by the District Court. No more than one such filing and part of another had ever been before the District Court (A504, 566). Further, the Judgment was defectively vague in that it directed that the Parklane filings be amended, "among other things," in three respects (A31), without any indication of what "other things" the District Court may have had in mind.

A. The return of Parklane to its status as a private company

In late June or early July, 1974, Somekh sought the advice of Parklane's accountants, Clarence Rainess & Co., and its general counsel, Kaye, Scholer, Fierman, Hays & Handler, concerning the possibility of returning Parklane to its former status as a private corporation (A47-50, 122-124, 605-606). On July 26, 1974, such a proposal was discussed at a meeting of the board of directors of Parklane. At that meeting, the amount to be paid to the public shareholders for their shares was considered and the determination was made to obtain the opinions of two independent appraisers (A552).

Two independent investment banking firms, Thomson & McKinnon Auchincloss Kohnmeyer, Inc. ("Thomson & McKinnon") and Foster Securities Corporation ("Foster Securities"), were retained to conduct independent appraisals of the value of the Parklane common stock. On August 28, 1974, Foster Securities advised that the value of the stock was between \$1.20 and \$1.30 per share. Thomas & McKinnon, which had been the underwriter in Parklane's 1968 public offering, independently advised Parklane that in its opinion the value of Parklane's stock, as of August 29, 1974, was between \$1.70 and \$1.85 per share (A508). At the time that the two independent firms were engaged, it was understood

that the public shareholders would be offered at least the amount of the higher of the two independent appraisals (A314-315).

At a special meeting of the board of directors of Parklane on August 29, 1974, it was decided, by a four to one vote, that a merger would be proposed whereby Parklane would be returned to the status of a private company and that the public shareholders of Parklane should be offered \$2.00 per share for their stock (A555-557).

The ensuing Proxy Statement, dated September 24, 1974, disclosed that Somekh, certain other persons associated with Parklane, and their families, transferred to Newco their 71.6% majority interest in Parklane in exchange for all of the stock of Newco; that Newco had been formed on August 27, 1974 for the purpose of the merger; that Newco was to be merged into Parklane; that Newco intended to vote its Parklane stock in favor of the merger; that the merger would result in Parklane becoming a privately held company; that all of the shares of Parklane would be cancelled; that each shareholder of Parklane, other than Newco, would be entitled to receive \$2.00 per share in cash; that the minority shareholders of Parklane would not be able to defeat approval of the merger; and that the minority shareholders had the right either to accept \$2.00 per share or exercise their appraisal rights (A505-506).

At the October 14, 1974 shareholders' meeting called for in the Proxy Statement, the shareholders of Parklane approved the merger, which was then consummated (A44-45).

B. The finding made with respect to, and the irrelevancy of, the purpose for the merger

The Court below, in its Opinion, stated that the SEC did not challenge the validity of the merger, consummated under the laws of the State of New York (A8); that "the resulting elimination of public shareholders could not possibly be thwarted"; that, upon the merger, the minority shareholders had no right to retain any interest in Parklane; that "the sole question facing a minority shareholder was whether to accept the \$2.00 per share price or to pursue his rights as a dissenting shareholder in an appraisal proceeding"; and that the only concern of the minority shareholders was "to evaluate the fairness of the per share offering price" (A20).

As will hereinafter appear (Point I, infra), the District Court's own reasoning left no doubt whatsoever but that, in the circumstances here, the purpose for the merger was totally irrelevant. All that mattered was that the

minority shareholders realize fair value for their shares. Thus, though the alleged purpose for the merger was a matter of indifference to a minority shareholder and, therefore, need not have been disclosed in the Proxy Statement, the District Court, over defendants' repeated objections (e.g., A69-71, 77-87, 136), allowed almost the whole of the four-day trial to be consumed by the introduction of evidence concerning the purpose for the merger and then found that the "overriding purpose" was to enable Somekh to repay a personal indebtedness and that this "overriding purpose" had not been disclosed in the Proxy Statement (A13).

However, even assuming the District Court's finding as to the "overriding purpose" for the merger were correct, the Proxy Statement adequately disclosed it (pp. 46-50, infra). In an all-inclusive statement, the Proxy Statement disclosed that, upon consummation of the merger, the shareholders of the surviving corporation "will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company" (A407).*

* In full, the disclosure in the Proxy Statement provides:

"If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company. The merger will make possible a combination of the resources of the Company with those of Mr. Somekh (who with his wife and trusts for the benefit of his children, owns approximately 86% of the stock of Newco) for the conduct of real estate activities of the type that Mr. Somekh has to date conducted individually (primarily development of garden apartments). Such a combination is presently being contemplated" (A507).

1. The facts concerning the District Court's finding of the "overriding purpose" for the merger

During its investigation, the SEC inquired into Somekh's indebtedness without ever inquiring into his far greater assets (A422-423). As a result, the SEC apparently assumed that the purpose for the merger was to enable Somekh to avoid "financial oblivion" -- an assumption which, as will be seen, was born of an obvious failure of the SEC investigation.

In a May 26, 1976 memorandum submitted in respect of the two motions made before the District Court, the SEC, without any support whatsoever, had asserted that Somekh's "only alternative to financial oblivion was to appropriate Parklane's corporate assets for his own purely selfish reasons." (Record on Appeal, Document No. 5, p.9)

Just as the SEC had in its investigation, at trial the District Court looked to Somekh's indebtedness, without regard to his far greater assets, to find that the "overriding purpose" for the merger was to enable Somekh to repay his personal indebtedness. The District Court confirmed the one-sided basis for its finding in stating that "There is not so much as a hint of Somekh's huge debts in the proxy statement" (A13). Clearly, Somekh's debts had no

more relevance in respect of the merger than did his far greater assets and it would have been no more relevant to have recited his debts in the Proxy Statement than it would have been to have recited his far greater assets.

While the Opinion below recites that, in 1974, Somekh and his wife were borrowers from Bankers Trust Company ("Bankers Trust") to the extent of approximately \$900,000; that Somekh was indebted to First National City Bank ("FNCB") in the sum of \$125,000; and that he was one of four co-guarantors on a note held by National Bank of North America ("NBNA") in the sum of \$150,000 (A9-10), the Opinion below inexplicably ignores the full extent of the far greater personal assets of Somekh and his wife, in 1974, amounting to more than \$4,000,000 (A423-431) -- a fact which the uncontradicted record established.

a. Somekh's assets

The record shows that in 1974 the \$4,000,000 of Somekh assets, which the District Court disregarded, far exceeded the amount of the three bank loans upon which the District Court relied in its Opinion. The assets consisted of substantial cash, securities, jewelry, mortgages and real estate (A423-431).

Thus, an April 25, 1975 letter to Bankers Trust (A481) contained a partial listing of Somekh's assets, owned in 1974, amounting to \$2,700,000 (A423). In addition, in 1974 Somekh (a) sold for \$175,000 cash a mortgage note of Rite-Aid Company (A424); (b) was owed \$150,000 from a transaction with Lehman Brothers, which was being paid at the rate of \$12,500 per month (A424-425); (c) owned a \$50,000 note of W.P. Estates (A425); (d) sold for \$59,500 a note on property in New York City (A426); and (e) had an interest in a property in Philadelphia (A426). These five items had a value of \$520,000 (A426-427).

Somekh and his wife, a co-obligor on the Bankers Trust Loan, also owned 453,700 shares of Parklane common stock (A507) and had interest income from various other sources in excess of \$60,000 per year (A431). Mrs. Somekh owned jewelry valued in excess of \$250,000 (A430-431).

b. The Bankers Trust loan

The Opinion below acknowledged that, in the case of the Bankers Trust \$900,000 borrowing alone, the collateral package exceeded \$2,000,000 (A9). In this regard, the Opinion states:

"The collateral for the personal loan consisted of the stock of Parklane held by Mr. and Mrs. Somekh, assignment or mortgaging of certain real estate, and assignment of other securities and negotiable instruments. Baggott [of Bankers Trust] testified that the collateral package exceeded \$2 million" (A9).

While Thomas A. Baggott, a vice-president of Bankers Trust, testified that, in 1974, he had requested some reduction in the loan, he also testified that he never called the loan; that he never demanded immediate repayment; that he never mentioned any specific amount by which he wanted the loan reduced; and that he gave no specific time by which to reduce the loan (A272-273).

Thus, the testimony of the SEC's own witness, Baggott, negates the statement of the Court below that Somekh was "[p]ressed with repayment demands" and, therefore, "began to consider having Parklane go private" (A10). At the time Somekh began to consider having Parklane go private, which was in late June or early July, 1974, he was certainly not being pressed by Bankers Trust for repayment of the loans. As Baggott had testified under oath at the SEC investigation, and as he confirmed at trial:

"We [Bankers Trust] knew what our security package was and the availabilities and that was what we felt the repayment when, as and if, would come from" (A286).

The Opinion below also notes that Baggott testified that in or about August 1974, in a meeting attended by Somekh and his accountant, and, again, at a September 5, 1974 meeting, Somekh "indicated he intended to bring Parklane private as an alternative means of liquidating the personal obligation" (A11). (emphasis added) This did not justify the District Court's conclusion as to the overriding purpose for the merger. The Bankers Trust loan was, as Baggott testified, collateralized by more than double its amount and Somekh had substantial other assets far in excess of the loan.

c. The FNCB loan

In the case of the FNCB loan, the Opinion below states that the \$125,000 "loan was called in as of July 2, 1974," (A10) which, even if inadvertent, plainly gives the impression that the calling of the loan was time-related to the first discussions had by Somekh in late June or early July, 1974 concerning the possibility of returning Parklane to its private status (A10-11). The FNCB loan was called in a July 23, 1974 FNCB letter (A548). This was after the discussions Somekh had earlier had with Parklane's accountants and attorneys as to the possibility of Parklane's return to private status.

d. The NBNA loan

The record also shows that the \$150,000 NBNA loan was unrelated to the decision to return Parklane to its private status. The NBNA loan was originally made to a partnership known as 433 JV, of which Somekh was one of four partners. Each of the partners had guaranteed the loan jointly and severally (A330). While NBNA had written Somekh in May, 1974 about the 433 JV loan and its repayment, Richard D. Tunick, an officer of NBNA called by the SEC as its witness, testified that NBNA sought either (a) repayment of the loan because of its low interest rate which NBNA could not increase as a non-corporate loan or (b) to have the loan refinanced through a corporate vehicle so that the interest rate could be lawfully increased substantially (A323, 332-334).

Thus, Tunick, on cross-examination, testified:

"Q At what rate was National Bank of North America making loans in May of 1974 to non-corporate borrowers?

A Well, to non-corporate borrowers, the rate of interest was governed by the usury laws.

Q What was that for this purpose?

A I believe it was 7-1/2 per cent.

Q Was there a proposal that the borrower become a corporate entity?

A I think the request on our part was to have the loan paid. As a means for payment, it was suggested that a corporate vehicle be utilized in order to refinance the loan.

Q If a corporate vehicle were to be utilized, the interest rate would go to what, sir?

A That would be governed by other usury laws, and I guess it could go as high as 25 per cent." (A332)

The 433 JV loan was refinanced, as had been proposed by NBNA, and was ultimately repaid through a corporate borrower. Tunick further testified:

"Q That loan was paid off to the National Bank of North America, was it not?

A The 433 JV loan was repaid through a loan to Shemok Ltd., which was in fact this corporate vehicle that we were referring to." (A334)

Of the \$150,000 loan, Somekh contributed only \$50,000 (A237).

In sum, the record shows the Somekh assets, as to which the Opinion below is silent, to have been far greater than Somekh's indebtedness; moreover, as has been seen, there has been no showing that there was an "overriding purpose" for the merger to repay the three bank loans, and, in any event, upon the District Court's own reasoning, based upon the nature of the rights of the minority shareholders, the purpose of the merger was irrelevant as a matter of fact and law. Furthermore, as to the finding of purpose, the District Court viewed materiality as a separate question (A13), but did not consider it.

- C. The facts concerning the District Court's finding that the status of discussions between the Federal Reserve Bank, on the one hand, and Parklane and its two subtenants, on the other hand, for possible cancellation of the leasehold interests was not properly disclosed

The second deficiency in the Proxy Statement claimed by the SEC, and found by the District Court, concerned the description of the status of certain discussions between the FRB, as lessor, on the one hand, and Parklane, the lessee and its two subtenants, on the other hand, for cancellation of a lease. Four separate parties were involved. The leased premises consisted of two stores at the southwest corner of John and Nassau Streets in the City of New York, one of which Parklane had subleased to a franchisee and the other of which Parklane had subleased to a third party, Jo-Ray Foods, Inc. ("Jo-Ray"). The lease and subleases were, by their respective terms, to expire December 31, 1978 (A13-16).

1. The events prior to September 24, 1974, the date of the issuance of the Proxy Statement

Commencing in 1968, the FRB had sought cancellation of the Parklane lease and subleases in connection with the possible construction of a building on the block of

which the leased premises were a part. Over the years, sporadic discussions had taken place without success (A600-601). Though the Opinion below is silent in this regard, the undisputed fact is that, well before the September 24, 1974 issuance of the Proxy Statement, the FRB had informed Parklane that plans had been drawn for a building which would not require cancellation of the Parklane lease.

On May 16, 1974, the FRB made its last offer for cancellation of the Parklane lease and subleases and delivered copies of the final architect's plan for the proposed building. It showed that the leased premises were to be excluded. In his letter to Somekh dated May 16, 1974, Curtiss, the FRB's representative, wrote:

"For your information, I enclose two prints of the final architect's plan of the new building to be constructed on the site. You will observe I have indicated in red pencil the area presently occupied by the Parklane and Jo-Ray stores which is planned to be excluded." (A576) (emphasis added)

At trial, Curtiss, confirming the facts stated in his May 16, 1974 letter to Somekh, testified:

"Q It is also the fact, Mr. Curtiss, is it not, that the Federal Reserve Bank had architectural plans drawn for the construction of a building at the Nassau-John Street site, working around the Parklane store without demolishing it?

A That is correct.

Q Isn't it a fact, sir, that you gave a copy of such drawings to Mr. Somekh?

A Yes, sir.

Q And the plans that you gave to Mr. Somekh showed that the Parklane premises would remain standing so that it would not hold up the project, isn't that so?

A That's correct.

Q Sir, may I show you Defendant's Exhibit P for identification, which purports to be a letter from John Dinkeloo, an architect, dated April 6, 1973, with two drawings, and ask you if you can identify those as the drawings which you had given to Mr. Somekh?

A Yes, sir." (A403-404)

Curtiss also testified:

"[Somekh] believed me, I think, entirely, when I told him that we were going to go ahead and build a building, and he could sit right there until 1978, it wouldn't bother us a bit." (A408)

In the same May 16, 1974 letter, Curtiss informed Somekh that the offer for cancellation was a 10-day offer which "must be accepted in writing to me by registered mail on or before May 26th, 1974" (A576). The amount of the FRB offer was not acceptable to Parklane's subtenants and, therefore, was never accepted. The FRB offer was \$800,000, whereas the combined demands of Parklane's two subtenants were \$900,000, so that acceptance of the FRB offer would have

meant that Parklane would have had to suffer a loss of \$100,000 (A384-386).

The demands of the Parklane subtenants prompted a counter-offer by Parklane. On June 27, 1974, Somekh wrote a letter to Curtiss in which Parklane counter-offered \$1,200,000 (A569). That counter-offer was based on written offers from Jo-Ray (A497) and the franchisee (A495), Parklane's subtenants, in which they agreed, for a limited time, to accept \$600,000 and \$300,000, respectively, for cancellation of their subleases. Based upon the time limits imposed by the subtenants, Parklane informed Curtiss that the counter-offer had to be accepted by July 10, 1974 (A569).

With the counter-offer of \$1,200,000 in hand, Curtiss, in a July 1, 1974 letter (A570) informed Somekh that while he would convey it "to the proper parties for their information," he, at the same time, informed Somekh that whether the FRB was then even willing to pay the \$800,000 it had previously offered was no more than "conjecture." In that letter, Curtiss wrote:

"Over recent months and at one time, I made it quite clear that the Federal Reserve Bank of New York was willing to pay a consideration of \$800,000 for a complete vacating. Whether this offer still holds is a conjecture." (A570) (emphasis added)

On the same day, July 1, 1974, Curtiss also wrote a letter to the FRB in which, among other things, he referred to the FRB's prior offer of \$800,000 as having been "withdrawn" (A494).

The next day, July 2, 1974, Somekh, responding to Curtiss' July 1, 1974 letter, again stated that insofar as the subtenants were concerned he had "no latitudes for negotiating anything; that my express authority expires on July 13th and I cannot promise anything beyond that date" (A502). (emphasis added) On July 15, 1974 Curtiss conveyed the FRB answer to the counter-offer. Curtiss testified that, in a telephone conversation on that day, he told Somekh that Parklane's offer of \$1,200,000 "is out of the question" (A393). (emphasis added)

2. The disclosure in the Proxy Statement

The July 15, 1974 conversation between Curtiss and Somekh was the last communication between them until after the September 24, 1974 date of the Proxy Statement (A399-400). On the basis of the undisputed facts, the Proxy Statement described the situation as follows:

"Early this year, the Company received a substantial offer with respect to a property, part of which is occupied by a franchisee and the balance by another sublessee, for the assignment of the Company's lease and the cancellation of the rights of the occupants. On the basis of

negotiations with the franchisee and other subtenant, the amount which would have been required to be paid to them would have represented substantially all of the sum offered. The offer has been withdrawn and there are no negotiations at present. The Company is unable to determine if another offer will be made." (A519)

The District Court could not, and did not, find that the Proxy Statement was inaccurate on the date of its issuance. Rather, it found that by reason of an October 4, 1974 meeting between Curtiss and Somekh, the unamended Proxy Statement was false in stating that "there are no negotiations at present" (A16). In so finding, the District Court inexplicably disregarded undisputed facts, namely, a telephone conversation between Curtiss and Somekh which, within a week of the October 4, 1974 meeting, confirmed that there was nothing to report at the October 14, 1974 Parklane shareholders' meeting and that there was no reason to amend the Proxy Statement.

3. The events between September 24, 1974, the date of the Proxy Statement, and October 14, 1974, the date of the Parklane shareholders' meeting

The October 4, 1974 meeting between Curtiss and Somekh, relied upon by the Court below, was arranged within a day or two prior thereto (A401). As will be seen, at the October 4, 1974 meeting, Curtiss had no authority

whatsoever to make any offer on behalf of the FRB, and Somekh had no authority whatsoever to make or accept an offer on behalf of Parklane's subtenants. Both Curtiss and Somekh recognized their respective lack of authority and held their discussion on that basis.

At the meeting, Curtiss informed Somekh that he was willing to recommend the \$1,200,000 figure to the FRB for cancellation of the lease (A15). Somekh was to do nothing unless the FRB were to adopt Curtiss' recommendation. Only if, after the meeting, Curtiss were to inform Somekh that his recommendation had been adopted by the FRB was Somekh then to attempt to obtain authority from, and the consent of, the Parklane subtenants for the cancellation of their subleases. Thus, in an October 7, 1974 letter to the FRB, Curtiss, reporting on the October 4, 1974 meeting, wrote:

"Upon my advise [sic] to Mr. Somekh that \$1,200,000 will be paid he immediately will attempt to secure respective letters from Counsel for a vacating of the two occupied premises by a date certain upon payment of the amounts stated." (A573)
(emphasis added)

This statement was confirmed by Curtiss at trial (A414-415). Indeed, upon examination by the District Court, Curtiss made crystal clear that any cancellation of the lease was dependent upon "the requirements of a subtenant and a franchisee"

(A340). Thus, the FRB and Parklane, who were but two of the four parties involved, could not accomplish anything by themselves.

In his October 7, 1974 letter to the FRB, Curtiss flatly stated that the Parklane franchisee and subtenant were the "problem" in preventing the cancellation of the lease (A571). Thus, though the Opinion below quotes only a so-called prefatory comment from Curtiss' October 7, 1974 letter (A15), that letter contains the following telling information:

"The President, Mr. Herbert N. Somekh, has conferred with me personally during the last few years, I should say in our joint attempt to evolve a plan or the amount of consideration acceptable to the three parties involved.

That point is the problem. Negotiating with Parklane alone would have caused a vacating several years ago, no doubt about that in my opinion. But Mr. Somekh's Parklane store operator is a Franchisee who has demanded a cash consideration to vacate, in an unreasonable amount at that, for his vacating. Mr. Somekh's sub-tenant's business now Jo-Ray Food, Inc., was purchased several years ago by questionable characters who very definitely have attempted to hold up all parties concerned." (A571)

This is not all. Though inexplicably absent from the Opinion below, at trial the District Court itself had elicited from Curtiss the fact that a telephone conversation between him and Somekh had taken place within a week of the

October 4, 1974 meeting in which Curtiss informed Somekh that he had recommended the \$1,200,000 amount to the FRB; that the FRB had price problems on the proposed building; that the FRB might not even build the building; and that "The figures were out" (A347).

In this regard the District Court's examination of Curtiss was as follows:

"[THE COURT:] After October 4th, when was the next time that you talked to him?

THE WITNESS: Talked to Mr. Somekh?

THE COURT: Yes.

THE WITNESS: Probably within a week.

THE COURT: How did you talk to him, in person or by phone?

THE WITNESS: I would say by phone.

THE COURT: Do you recall what the conversation was?

THE WITNESS: That I recommended the amount and that they had some price problems on their new building, to the extent they may not even build it. The figures were out." (A347)

It is thus clear, at the very least, that Curtiss had given Somekh no reason to believe that any offer would be made by the FRB. There was nothing

to report to the Parklane shareholders at the October 14, 1974 meeting and no reason to amend the Proxy Statement. It accurately disclosed that "there are no negotiations at present. The Company is unable to determine if another offer will be made" (A519).

Against all the uncontroverted evidence as to what actually transpired prior to the October 14, 1974 Parklane shareholders' meeting, establishing that there were no reasonable grounds to believe that the possibility of cancellation of the FRB lease would ever come to pass, the Opinion below relies upon the speculation Somekh expressed in his October 29, 1974 post-merger letter to Baggott of Bankers Trust (A16). Stating in that letter that he had his "fingers crossed," Somekh speculated that he might be headed towards a deal with the FRB (A575) -- a speculation which never became a reality and a deal which has never been consummated. As Curtiss, on cross-examination, testified:

"Q Mr. Curtiss, isn't it the fact that to this day you have never advised Mr. Somekh that the Federal Reserve would pay one million, two for the termination of the Parklane leasehold at 68-70 Nassau Street, isn't it?

A That is correct." (A403)*

- D. The facts concerning the finding that one of the two appraisals disclosed in the Proxy Statement was based upon inadequate information in three respects

The Proxy Statement disclosed that two independent investment banking firms had made appraisals as to the fair

* The District Court, in a completely gratuitous remark, unsupported by the record, observed that "Once Parklane learned that the SEC was investigating these negotiations, it is entirely possible that it chose not to close the deal" (A28). The actual fact is that there never was a deal to close. In light of the District Court's unsupported speculation, the attention of this Court is respectfully invited to The New York Times of November 13, 1976 (p.27), which reported:

"The Federal Reserve Bank of New York announced yesterday that it had abandoned plans to build a 42-story office tower adjacent to the bank's headquarters in the financial district.

Paul A. Volcker, president of the bank, said the decision not to build was dictated by rising construction and other costs, which exceed restraints set by the board of governors of The Federal Reserve System."

The FRB construction cost problems was one of the very reasons Curtiss gave Somekh, prior to the October 14, 1974 Parklane shareholders' meeting, in informing him that the FRB might not build its proposed building (A347). A copy of The New York Times article is annexed hereto as Addendum A.

value of Parklane's common stock; that Thomson & McKinnon had valued the stock at between \$1.70 and \$1.85 per share; and that Foster Securities had valued the stock at between \$1.20 and \$1.30 per share (A508).

In its complaint, the SEC had mistakenly concluded that the proxy materials used in connection with the October 14, 1974 merger contained

"Statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock." (A587)

This contention, both on defendants' motion to dismiss the complaint and at the trial, was shown to be incorrect. At trial, the SEC retreated from its claim. It made no attempt whatsoever to show that the Foster Securities appraisal, in any respect, was based upon inadequate information. Nor did the SEC even attempt to controvert the evidence to the contrary presented upon defendants' motion to dismiss the complaint. Instead, at trial, the SEC sought to prove only that Thomson & McKinnon had been inadequately informed in three respects.

The District Court found that Russ of Thomson & McKinnon had been unaware of three items of information in connection with its appraisal (A17). However, as will now

be seen, as to the first item, which concerned a contemplated sale by Somekh of some real property to Parklane after the merger, Russ testified that he had been informed by Somekh of such contemplated sale; as to the second item, which concerned a claimed use to be made by Somekh of approximately \$1,000,000 of corporate assets, the testimony was based upon a hypothetical question as to which no such fact had been established, as the Opinion below otherwise suggests; as to the third item, which concerned the possible cancellation of the FRB-Parklane lease, Russ testified that, being conjectural, it would not have been evaluated in the appraisal.

None of these three items supported a finding that the Thomson & McKinnon appraisal was made upon the basis of inadequate and incomplete information.

1. Russ' knowledge of the possible sale by Somekh of some real estate interests to Parklane

The Opinion states that Russ was "unaware of Somekh's intention to sell real property to the corporation" (A17) and that had he been aware of this, "it would have affected the appraisal" (A21). In so saying, however, the Opinion below overlooks Russ' testimony on cross-examination which negates those statements.

While the finding of the Court below is based upon testimony of Russ on direct examination, upon cross-examination Russ' recollection was refreshed and he then confirmed his contrary prior sworn testimony given during the SEC investigation. Upon cross-examination, Russ, contrary to the Opinion below, testified that he was, in fact, aware of the possible merger of some of Somekh's real estate operations into Parklane because Somekh himself had so informed Russ. Thus, Russ testified:

"Q Sir, isn't it the fact that during the course of the work you were doing in respect of your appraisal that the subject of cash flow and real estate operations was mentioned to you, sir?

A Yes, it was mentioned.

Q Do you recall, sir, having been asked these questions and giving these answers when you were examined by the SEC in the course of its investigation, sir:

'Q What did he [Somekh] tell you, generally?

A He had some notions that if -- if he could develop -- if he could use the cash flow of Parklane, he might merge some of his real estate operations into the company after it went private.'

Do you recall saying that?

A I recall saying that, yes." (A313-314)

The record also flatly negates the observation in the Opinion below that had Russ known, as in fact he did, of the possible sale by Somekh of some real estate interests to Parklane after the merger, it would have affected the appraisal. In this regard, Russ, during the SEC investigation, testified that the contemplated sale of real estate had no bearing upon the appraisal. The question squarely put to Russ by the SEC and the unmistakable answer he gave were as follows:

"Q Did this have any bearing upon your opinion letter?

A No." (A616)

At trial, Russ, as an appraiser, went even further. He testified that if the possible sale by Somekh of some real estate to Parklane had been taken into account, his appraisal of the fair value of Parklane's shares would have been lower. Russ, on cross-examination, testified as follows:

"Q Take the situation that Mr. Ormsten [of the SEC] put to you in which he postulated the tying up of a million dollars of cash flow in real estate.

How would that affect your appraisal, sir?

A The appraisal letter states that, in our opinion, the single strongest asset of the Parklane Hosiery Company was its ability to generate cash. The diminution of that ability would have adversely affected our appraisal.

Q So that the appraisal of \$1.78 would have been less?

A Given that set of circumstances, yes."
(A312-313)

2. The purported use to be made of corporate assets

The Opinion below states that Russ testified he was not told and was not aware of Somekh's plans to use nearly \$1,000,000 of corporate assets to reduce his personal indebtedness (A17). This was not based upon any fact established in the record. It was based only upon the negative answer by Russ to a hypothetical question, which the Court below permitted over the express objection of defendants' counsel. The negative answer was given to a question which assumed a fact not established in the record that, at the time in August 1974 when the Thomson & McKinnon appraisal was made, approximately \$1,000,000 of corporate assets were to be used by Somekh to repay his personal indebtedness.

The hypothetical question also improperly assumed that if Somekh were to receive the assumed amount of approximately \$1,000,000 of corporate assets Parklane would not receive full consideration therefor. The hypothetical question asked by the SEC; the objection made and overruled; and the answer Russ gave to the question were as follows:

"Q Mr. Russ, did you know at the time you applied your various techniques that approximately \$1 million in corporate assets were to be used by Mr. Somekh to reduce his personal indebtedness?

MR. PARKER: Objection, your Honor.

THE COURT: I will permit it. Go ahead.

MR. PARKER: I'd like to be heard, if you will permit me.

THE COURT: Sure.

MR. PARKER: I think it is hypothetical, speculative, it is not supported by the record, and there is no foundation laid in this record to permit such a question to be asked. It is not probative of anything.

THE COURT: I will permit it.

Go ahead. Answer it.

THE WITNESS: Could you repeat the question, please?

(Record read)

A No, I was not aware of that." (A306-307)

The reason for Russ' negative answer is obvious. The question was not based upon any fact. There could be no other answer. The actual facts are, as the Proxy Statement disclosed, that a combination of some of Somekh's real estate activities with Parklane's resources was contemplated -- a fact of which Russ testified he was aware at the time of the Thomson & McKinnon appraisal (A313-314).

Nor was there any fact to support the implication

of the hypothetical question that Somekh either was to receive the assumed amount of approximately \$1,000,000 of corporate assets or that such amount was to be received without furnishing full consideration therefor. That hypothetical question and the negative answer to it could not establish any fact. Russ' testimony that he did not know a purported, but unproven, fact, as of the time of the Thomas & McKinnon appraisal, could have had no significance.

3. Russ' testimony that if, as was the case, cancellation of the FRB-Parklane lease was conjectural, it would not have been evaluated in the Thomson & McKinnon appraisal
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The Opinion below states "Russ testified that the fact that Parklane was merely negotiating with the FRB would not have excluded it from consideration in the appraisal" (A21). In so stating, the Opinion disregarded other related testimony of Russ.

Thomson & McKinnon was retained on August 12, 1974 to appraise the value of Parklane's stock. The Thomson & McKinnon appraisal was made as of August 29, 1974 (A303). By that date, as has been seen (pp. 24-25, supra), the facts were that there was no offer for cancellation of the FRB-Parklane lease outstanding; that Curtiss, on July 1, 1974, had written Somekh that the expired \$800,000 FRB offer was a "conjecture"; and that Curtiss, on July 15, 1974, had told Somekh that the \$1,200,000

counter-offer was "out of the question".

In the light of these facts, Russ' testimony negated the impression given by the Opinion below that Russ "would not have excluded" from the appraisal the possible cancellation of the FRB-Parklane lease. At the very inception of Russ' cross-examination, he testified as follows:

"Q Mr. Russ, if the prospect of the realization of \$300,000 that Mr. Ormsten [of the SEC] referred to was conjecture, would that have made a difference as against the likelihood of it having happened?

A Yes.

Q What would that difference be, sir?

A The difference was that I, specifically, and my firm had given me guidelines to try to deal with as many of the events as we could reasonably predict. We tried to stick to that parochial view.

We were evaluating events we could predict and conjecture and speculation about either external events or even internal events that we could not put a firm reason to expect it to occur, we did not evaluate"
(A311-312). (emphasis added)

4. The testimony of Rubinstein of Foster Securities during the SEC investigation also confirms the District Court's error as to the items of information provided the appraiser

It is noteworthy that, at trial, the SEC did not

call any representative of Foster Securities, the second of the two independent appraisers, though the SEC had, in its investigation, interrogated under oath Mr. Frank Rubinstein of that firm concerning the appraisal it had made of the Parklane shares. Though Rubinstein's relevant testimony was presented to the Court below on defendants' motion to dismiss the complaint (A617-619), and was not challenged by the SEC, the Opinion below is completely silent as to the fact that the Rubinstein testimony negated the claim made by the SEC that the appraisers were provided with insufficient information.

Just as Russ had testified that the possibility of a post-merger real estate transaction had no bearing on the Thomson & McKinnon appraisal (p. 35, supra), Rubinstein confirmed the fact that transactions which might occur after the merger would not affect an appraisal of the fair value of the stock. Thus, Rubinstein testified at the SEC investigation as follows:

" . . . I was not as concerned with what he [Somekh] was going to do privately. I was more concerned with the fellow who had bought his stock and what he was going to get for it, not what Mr. Somekh was going to do." (A617)

Rubinstein also testified that he was aware of the possible cancellation of the FRB-Parklane lease and that, because of its uncertainty, it was not included in the Foster Securities

evaluation. Thus, interrogated by the SEC, Rubinstein testified:

"Q Did Mr. Somekh mention to you in the course of your evaluation anything about the possible sale back to the Federal Reserve Bank of a lease that Parklane held?

A In fact you will find in my notes that I was aware of this possibility, and I asked the question about it. I asked the question about it and he said he had nothing, that they had approached or there was some discussion sometime in the past and there was nothing at the moment, and I included it -- I said above valuation does not take into consideration any proceeds from the Nassau Store since it is impossible to ascertain." (A618-619)

Thus, negating the statements made in the Opinion below, the record shows (a) that Russ of Thomson & McKinnon testified he was informed by Somekh of the possible merging of some of his real estate into Parklane after the merger and that it did not affect his appraisal (p. 34, supra) and (b) that given the conjectural nature of the cancellation of the FRB-Parklane lease, it would not have played any role in his appraisal (pp. 35-36, supra). The record also shows (a) that, for purposes of appraising the value of the Parklane shares, Rubinstein of Foster Securities was not concerned with what Parklane would do after the merger (p. 40, supra) and (b) that he was aware of the situation regarding the FRB-Parklane lease for which no value was assigned in

the appraisal because of uncertainty (p. 41, supra).

In sum, the record plainly negates the statement in the Opinion below that there was a "defect in the appraisal" and, accordingly, its conclusion that there was a need to disclose any such purported defect. Moreover, the record will be searched in vain for even a hint that the appraisers were not given any information requested or that their function was in any way impeded.

POINT I

The Court below erroneously believed that the purpose for a corporate merger was relevant under the federal securities laws even though the minority shareholders were not to retain any interest in the surviving corporation.

The SEC mistakenly claimed, and the District Court erroneously assumed, that the purpose for the Parklane-Newco merger was relevant under the federal securities laws. Upon such an assumption, the District Court then found that the Proxy Statement had not disclosed that the "overriding purpose" for the merger was to enable Parklane's majority shareholder, Somekh, to repay a personal indebtedness (A13).

The finding was meaningless. First, the District Court did not find, or even consider whether, disclosure of the purpose for a merger was required in a proxy statement

where, as here, the minority shareholders were not to retain any interest in the surviving corporation. Second, the Opinion below itself demonstrates that, in the circumstances here, even if the purpose of a merger were to benefit personally a majority shareholder, it would be irrelevant, and, therefore, need not be disclosed. The Opinion below itself states that in this case "the sole question facing a minority shareholder was whether to accept the \$2.00 per share price or to pursue his rights as a dissenting shareholder in an appraisal proceeding" (A20). (emphasis added) In short, as to that sole question, the purpose for the merger had no relevance whatsoever.

Subsequent to the decision in this case, the Supreme Court confirmed the irrelevance, under the federal securities laws, of the purpose for a corporate merger where, as here, the minority shareholders were not to retain any interest in the surviving corporation. Santa Fe Industries, Inc. v. Green, ____ U.S. ____, 45 U.S.L.W. 4317 (March 23, 1977).

Santa Fe, an action brought under § 10(b) of the 1934 Act, involved a short form statutory merger under Delaware law whereby a 95% owned subsidiary was merged into its parent corporation and became a wholly-owned subsidiary;

as is the case here, the minority shareholders' interests were eliminated. In Santa Fe, the Supreme Court recognized, as did the District Court here, that the minority shareholders could not defeat the merger, could not retain any interest in the surviving corporation, and were entitled only to choose between accepting the price offered for their shares and the exercise of their appraisal rights.

In Santa Fe, the Supreme Court agreed with the District Court's dismissal of the complaint which had claimed that there was no justifiable business purpose for the merger and that the sole purpose for the merger was to eliminate the minority shareholders. The Supreme Court also agreed with the District Court's dismissal of the claim that the price offered was fraudulently understated. It thus adopted the reasoning of the District Court that where there is adequate disclosure of the relevant information, the merger transaction was beyond the purview of § 10(b) of the 1934 Act.

The situation here is the same. While in Santa Fe, supra, the question of adequate disclosure was tested on the basis of the allegations of a complaint, here, it is the trial record which establishes that there was adequate disclosure of the relevant information. Hence, the purpose for the merger is as irrelevant here as the Supreme Court held it was in Santa Fe.

More particularly, as Mr. Justice Stevens pointedly observed in his concurring opinion:

"The motivation for the merger is a matter of indifference to the minority stockholders because they retain no interest in the corporation after the merger is consummated." 45 U.S.L.W. at 4322 n.2.

It is respectfully submitted that the Court below was in error in assuming that the purpose for the Parklane merger was relevant and permitting almost the whole of a four-day trial to be devoted to that irrelevant issue -- an issue as to which the District Court, in its opinion, did not even pass upon the question of materiality.

POINT II

None of the three respects in which the District Court erroneously found the Proxy Statement deficient was material; the District Court misapprehended and misapplied the test of materiality.

It has been seen that factually the record does not support the District Court's finding of three deficiencies with respect to the Proxy Statement. However, even if the correctness of those three findings were assumed, none of them was material as a matter of law.

As to the so-called "overriding purpose" of the merger, the District Court did not even reach consideration of its materiality. In this regard, while the Opinion below states that materiality "is a separate question which will be considered at a later point in this Opinion"

(A13), the District Court here did not consider whether the purpose of the merger was material. As to the remaining two deficiencies found, the District Court misapprehended and misapplied the applicable test of materiality.

A. The immateriality of the "overriding purpose" of the merger

Even if the District Court had passed upon the materiality of the so-called "overriding purpose" of the merger, the inescapable conclusion is that it was immaterial as a matter of law. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).

In Northway, supra, the Supreme Court held that the test of the materiality of a fact depends upon a showing of a substantial likelihood that the fact would have assumed "actual significance" in the deliberations of a reasonable shareholder. Stated in other words, a showing must be made that the "total mix" of information available to the reasonable investor would have been "significantly altered" by disclosure of the fact in question. As the Supreme Court, in Northway, wrote:

"The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with Mills' gen-

eral description of materiality as a requirement that 'the defect have a significant propensity to affect the voting process.' [emphasis in original] It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 426 U.S. at 449. (emphasis added)

Here, even if the District Court had found that the "overriding purpose" for the merger was material, its non-disclosure was immaterial in light of the disclosure in fact made in the Proxy Statement. The requirement of a substantial likelihood of its significance to shareholders cannot be met. The disclosure in the Proxy Statement was all-encompassing in its statement that:

"If the proposed merger is consummated, the shareholders of Newco will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company." (A507)

By this disclosure, the minority shareholders were unmistakably informed that only the shareholders of the surviving corporation would have the benefit of all of the assets of Parklane after the merger. In light of the disclosure made, the "total mix" of information available to the minority shareholder would not have been altered -- let

alone "significantly altered" -- by a disclosure of the purported "overriding purpose" found by the District Court. It could have made no difference to the minority shareholders whether or not the "overriding purpose" of the merger was to enable Somekh to pay a personal indebtedness or to have gifted the Parklane assets to charity or to have used those assets in any other way.

As the District Court wrote in Browning Debenture Holders' Committee v. DASA Corp., 357 F. Supp. 1010, 1012 (S.D.N.Y. 1972):

"There are infinite ways in which to select and arrange facts and conclusions, and a court in enforcing § 14(a) of the Exchange Act cannot act as a supervisory copy editor, rearranging and shifting emphasis to meet its, or plaintiffs', ideal of objective reporting. Rather, '... it is enough if proxy material sets forth all the facts necessary to enable a reasonably intelligent stockholder to make his own informed decision.' Abraham v. Nytronics, Inc., 312 F. Supp. 519, 524 (S.D.N.Y. 1970) (Mansfield, D.J.)." (emphasis added)

Since here, the purpose for the merger was a matter of indifference to the minority shareholders, Santa Fe Industries, Inc. v. Green, supra, it could not have assumed "actual significance" in their deliberations. The purpose for the merger could have had no bearing upon the choice they had either to accept the offering price or to exercise their right of appraisal. As the Court below itself wrote, "the sole question facing a minority share-

holder was whether to accept the \$2.00 per share price or to pursue his rights as a dissenting shareholder in an appraisal proceeding" (A20).

Just as Judge Duffy below made no finding here that the so-called "overriding purpose" was material, so was it that, in an earlier case, he had held, on similar facts, that the absence of disclosure of a valid business purpose for a merger was immaterial and that a claim to the contrary was meritless. Lessler v. Dominion Textile Limited, 411 F. Supp. 40 (S.D.N.Y. 1975). It was enough, Judge Duffy had held, that the minority be informed that a corporation, such as Newco here, had been formed solely for the merger and that the result of the merger would be 100% ownership by the majority shareholders. Thus, in Lessler, supra, Judge Duffy wrote:

"Equally meritless is the charge that the Information Statement does not set forth a valid business purpose for the merger. On the contrary, it discloses that Newco was formed solely for the merger and that the simple result of the merger will be the 100% ownership of DHJ by Dominion. The lack of a valid business purpose is not necessarily fatal under the federal securities laws. Tanzer Economic Associates, Inc. v. Haynie, 388 F. Supp. 365, 369 (S.D.N.Y. 1974)." 411 F. Supp. at 42.

Here, as in Lessler, supra, a corporation was formed for the purpose of effecting a merger under the laws of the State of New York. Here, as in Lessler, the result of the merger was to be 100% ownership of the

surviving corporation by its majority shareholders. In a striking parallel to Lessler, the Parklane Proxy Statement likewise stated that, "The proposed merger is intended to restore the Company to the status of a privately held company which it occupied prior to its public offering in December, 1968. Newco was formed on August 27, 1974 for the purpose of accomplishing this result through the proposed merger..." (A506). Both in Lessler and here, a disclosure of a valid business purpose was immaterial.

It is respectfully submitted that the non-disclosure of the "overriding purpose" of the merger, which the District Court found, was, as a matter of law, irrelevant and immaterial under the federal securities laws.

B. There was no need to amend the Proxy Statement to reflect the meeting between the representatives of the FRB and Parklane held subsequent to the September 24, 1974 issuance of the Proxy Statement and prior to the October 14, 1974 Parklane shareholders' meeting.

1. There were no reasonable grounds for Parklane to believe that a new offer would be made to cancel the FRB-Parklane lease.

The District Court did not find that the September 24, 1974 Proxy Statement misrepresented the status of the

prior discussions with respect to cancellation of the FRB-Parklane lease. Rather, by reason of an October 4, 1974 meeting between Curtiss and Somekh, the District Court concluded that "the unamended proxy material was false when it stated that 'there are no negotiations at present'" (A16). In so doing, the District Court ignored the very testimony it had itself elicited of a subsequent telephone conversation between Curtiss and Somekh which occurred within a week of October 4, 1974 -- a telephone conversation which confirmed that there were no reasonable grounds for believing that the FRB would make a new offer for the cancellation of its lease with Parklane and that, therefore, there was no reason to amend the Proxy Statement (pp. 28-30, supra).

Where, as here, there were no reasonable grounds for believing, in the period September 24, 1974 to October 14, 1974, that the FRB would make a new offer for cancellation of the lease, no amendment of the Proxy Statement was necessary. Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247 (2d Cir. 1973); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); Alameda Oil Company v. Ideal Basic Industries, Inc., 337 F. Supp. 194 (D. Col. 1972).

In Alameda Oil, supra, a proxy statement in respect of the proposed merger of two corporations did not disclose communications covering a merger proposal by a third corporation. An action was then brought charging violation of §§ 10(b) and 14(a) of the 1934 Act based, among other things, upon the failure to disclose the communications concerning the third corporation's prior merger proposal. The Court found that the defendant-directors had no reasonable grounds for believing that any such merger proposal was outstanding and, therefore, that the third corporation's merger proposal did not have to be disclosed in the proxy statement. The Court, in directing a verdict for the defendants, wrote:

"3. Viewed in the light most favorable to the plaintiffs the evidence would not support a finding that the communications received by Potash Company of America in August 1967 from Susquehanna constituted a real or solid outstanding merger offer from Susquehanna, and the evidence is conclusive that the directors of PCA had reasonable grounds for believing that any merger proposal made in the August communications from Susquehanna had been withdrawn and was not outstanding. Consequently, the PCA directors were under no obligation to inform

the PCA stockholders of the communications from Susquehanna or to submit to them for their consideration the proposal to merge PCA with Susquehanna described in the August 1967 communications from Susquehanna.

4. If the communications from Susquehanna in August 1967 were regarded as expressing an interest in negotiating a merger of PCA with Susquehanna, the evidence would not support a finding that the value and advantage of the terms suggested was so clear as to require the directors of PCA to submit the proposal to the PCA stockholders for their consideration." 337 F. Supp. at 195. (emphasis added)

As in Alameda Oil, supra, here the evidence established that Parklane, after its Proxy Statement had been issued, had, at the very least, reasonable grounds for believing that the FRB would not make another offer for cancellation of its lease. Therefore, there was no reason to amend the Proxy Statement to disclose the discussion at the October 4, 1974 meeting between Curtiss and Somekh and their subsequent telephone conversation which confirmed Parklane's belief.

2. The District Court failed to apply the Texas Gulf Sulphur test in deciding the materiality of a future event.

Contrary to the conclusion of the Court below, the lack of any need for any amendment of the Proxy Statement here fits four-square the pertinent principle enunciated in Texas Gulf Sulphur, supra. Any possible cancellation of the FRB-Parklane lease depended upon the occurrence of a future event, i.e., another offer being made by the FRB and its acceptance by Parklane and its two subtenants. Where, as here, a purported non-disclosure related to the occurrence of a future event, this Court has consistently held that the question of materiality turns upon

"... a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." SEC v. Texas Gulf Sulphur Co., supra, 401 F.2d at 849.

In balancing those two considerations in this case, it is clear that the purported non-disclosure of the status of the FRB-Parklane discussions between the September 24, 1974 Proxy Statement and the October 14, 1974 Parklane shareholders' meeting was obviously immaterial.

In Sonesta, supra, this Court also held that a statement relating to a future event may be material and requires disclosure "provided there appears to be a reasonable

likelihood of its future occurrence." 483 F.2d at 251.

Otherwise, there is no need for disclosure.

Here, the Court below, while acknowledging the Texas Gulf Sulphur test (A22), did not apply it. Instead, to avoid its application, the Court resorted to an unsupported distinction between an "affirmative misstatement" and a "non-disclosure" -- a distinction which, it is respectfully submitted, is one without a difference. An actionable event may arise in either case, i.e., from a misstatement of a material fact or the omission to state a material fact necessary in order to make the statement made not misleading. If a fact is not material, it would make no difference, as a matter of law, whether the fact is one which has been misrepresented or omitted.

Upon the facts here, had the District Court properly applied the Texas Gulf Sulphur test, it would have had to conclude that the disclosure made in the Proxy Statement concerning the status of the FRB-Parklane discussions was not materially misrepresented. First, it is clear upon the basis of the October 4, 1974 meeting and subsequent telephone conversation, that the "indicated probability" of the FRB-Parklane lease being cancelled at a profit to Parklane was non-existent, or, at best, minimal. Not only had fruitless discussions taken place over six years, but, in that entire period, the FRB's highest offer had been \$800,000

which, in light of the lowest demands made by Parklane's subtenants, would have meant a \$100,000 loss to Parklane. And, as Curtiss testified, he had told Somekh, within a week of the October 4, 1974 meeting, that the FRB may not even build the proposed building (p. 29, supra).

In addition, the "indicated probability" of the cancellation of the lease had to be further minimized because, without the consent of Parklane's two subtenants, there could be no cancellation by the FRB and Parklane. As the Court below observed, the two subtenants were the "stumbling block" to cancellation (A14). Without their concurrence, there was nothing.

Second, the "anticipated magnitude of the event in light of the totality of the company activity" was insubstantial. Hence, for that reason as well, the facts were immaterial. Even if the FRB had acted on Curtiss' recommendation and offered \$1,200,000 for cancellation of the lease, and even if Parklane's subtenants could have been persuaded to give their consent, the most that Parklane could have realized was \$300,000 before taxes.

In the Opinion below, the significance of such an amount was demonstrably exaggerated. In seeking to justify its conclusion of materiality, the District Court unfairly compared \$300,000 before taxes with \$533,000 net income of

Parklane after taxes (A23). Thus, if the District Court had made a fair comparison, it would have seen that the result could not have been \$300,000 for Parklane, but only half that amount after taxes.

Finally, the selective use the District Court made of the record is also seen in its heavy, if not exclusive, reliance on the phrase in the Proxy Statement that: "there are no negotiations at present" between the FRB and Parklane (A16). In the immediately following sentence, ignored by the Court below, the Proxy Statement stated that "The Company is unable to determine if another offer will be made" (A519). While the Opinion below gives a contrary impression, the Proxy Statement did not foreclose the possibility that another offer might be made. It is respectfully submitted that there was no reason for the District Court to look to one part of the disclosure and not consider the disclosure as a whole.

- C. The District Court erroneously determined that the Proxy Statement failed to disclose that one of the two independent appraisers was unaware of three items of information and erroneously concluded that those items were material.

The third of the three findings by the District Court of a material misrepresentation or omission is also contrary to the record. The Court below found that Russ

of Thomson & McKinnon was unaware of three items of information. However, as has been seen (pp. 33-39, supra), (a) one such item Russ testified he was in fact aware of and that it had no bearing upon his appraisal, (b) the second such item was hypothetical and not fact, and (c) the third such item was conjectural and would not have played a part in Russ' evaluation. Nevertheless, the District Court found those items had a substantial likelihood of affecting the price of the Parklane stock and were material no matter how insignificant or immaterial the amount was by which the price might be affected.

Not only did the District Court err in its factual findings, but it also misconstrued and misapplied the materiality test of TSC Industries, Inc. v. Northway, Inc., supra. The District Court mistakenly held that anything which would affect the price, upward or downward, offered to shareholders in connection with the Parklane merger would be material. It apparently read Northway to mean that if, by reason of an omitted or misstated fact, there was a "substantial likelihood" that the price would be affected "upward or downward," even by a miniscule amount, such a fact would be material. The Opinion below states:

"If the shareholder is only called upon to evaluate the fairness of the per share offering price, then any omission or misstatement of fact which would affect the offering price must be material under the Northway test. Anything which would affect the price, upward or downward, would necessarily be important to the shareholder in making this decision. Proceeding one step further, an omitted or misstated fact which would cause a substantial likelihood of affecting the price would, therefore, have a substantial likelihood of being considered important" (A20-21). (emphasis in original)

The District Court's test is certainly not the materiality test in Northway, supra. In disregard of Northway, the District Court did not consider whether the information as to which it had mistakenly found Russ was unaware, (a) would have affected the offering price to a sufficient degree for it to have assumed "actual significance in the deliberations of the reasonable shareholder," or (b) would have "significantly altered the 'total mix' of information made available." TSC Industries, Inc. v. Northway, Inc., supra, 426 U.S. at 449. (emphasis added)

It is respectfully submitted that none of the three respects in which the District Court found the Proxy Statement deficient was material and that on this ground alone the Judgment below should be reversed.

POINT III

The District Court erred not only in finding violations of the federal securities laws, but also in finding that they were knowing violations.

The District Court held that to find a violation in a case such as this, the violation must be a knowing one (A26). See SEC v. American Realty Trust, [1976-77 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,913 (E.D. Va. 1977); SEC v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D.N.Y. 1976); see also Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); but see SEC v. Universal Major Industries Corp., [1976-77 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,804 (2d Cir. 1976); SEC v. World Radio Mission, Inc., 544 F.2d 535 (1st Cir. 1976).

In the Opinion below, the District Court stated that it believed that the violations of § 14(a) of the 1934 Act it had found were knowing violations (A26). Only in the Judgment did the District Court provide that there were also knowing violations of § 17(a) of the 1933 Act and §§ 10(b) and 13(a) of the 1934 Act and certain rules thereunder (A30). It is respectfully submitted that the District Court not only erred in finding violations of the federal securities laws, but it compounded its error in finding that the violations were knowing.

In Ernst & Ernst, supra, the Supreme Court held that in a private action brought under § 10(b) of the 1934 Act for the recovery of damages, scienter was a requisite element of the cause of action. There, the Court expressly stated that it did not pass on the question whether in an action for an injunction a showing of scienter was also necessary. 425 U.S. at 193-94 n.12. The Supreme Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." 425 U.S. at 193-94 n.12. Here, not only does the Proxy Statement manifest an intent to disclose, but the record amply confirms such an intent.

Thus, the Proxy Statement informed the Parklane shareholders that the purpose of the merger was to return Parklane to its status as a private company and that Newco was formed for that purpose. It also informed the shareholders that, upon consummation of the proposed merger, the majority shareholders would own 100% of Parklane and "will be entitled to the benefit of all of the assets, earnings, earning capacity and cash flow of the Company" (A519). Such disclosure, in a similar case, was deemed by the very same District Judge who sat below to be entirely lawful and proper. Lessler v. Dominion Textile Limited, supra.

The Proxy Statement likewise expressly discloses the contemplated transactions between Parklane and Somekh regarding the combination of certain of his real estate operations with the resources of Parklane after the merger (A507). There was certainly no intent to deceive in that regard.

Similarly, as the Opinion below acknowledges, the status of the FRB-Parklane discussions at the time of the issuance of the Proxy Statement was accurately disclosed (A16). And, as has been seen, the October 4, 1974 meeting between Curtiss and Somekh and their subsequent telephone conversation, separately and together, did not alter the accuracy of the disclosure or give Parklane any reasonable ground to believe there would be a cancellation of the lease (pp. 26-30, supra).

Regardless of the significance which the District Court attributed to the October 4, 1974 meeting, it could not have maintained such significance had the Court taken into account the substance of the telephone conversation which followed it and which the Court itself, on its own examination, had elicited. That testimony showed that there could not have been intent to deceive.

As to the finding that Russ of Thomson & McKinnon, one of the two independent appraisers of the value of Park-

lane's common stock, was unaware of any relevant or material information, the situation is the same. Once again the District Court chose to rely on the SEC's direct examination of Russ and to disregard the contrary facts brought out upon cross-examination and Russ' sworn testimony given during the SEC's prior investigation. It is respectfully submitted that there is no basis for such a selective treatment of the record and the Opinion below certainly does not provide one.

In sum, the record shows the Proxy Statement was a good faith effort to disclose and that Parklane properly made the required disclosures. There is no support for the finding of any violation here, let alone a knowing violation.

POINT IV

The District Court erroneously held that defendants violated § 17(a) of the 1933 Act though there was no "offer or sale of any securities" by defendants.

The Judgment (A30), unlike the Opinion below, recites that the District Court found that defendants violated § 17(a) of the 1933 Act. However, since § 17(a) proscribes certain conduct only "in the offer or sale of any securities" and since defendants did not offer or sell any securities, no violation of § 17(a) could

properly have been found. "Section 17(a) of the 1933 Act provides a cause of action only for a defrauded purchaser." Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co., 430 F.2d 355, 359 (2d Cir. 1970), rev'd on other grounds, 404 U.S. 6 (1971); Crowell v. Pittsburgh & Lake Erie R.R., 373 F. Supp. 1303 (E.D. Pa. 1974).

POINT V

The Judgment is unduly and improperly vague insofar as it orders defendants to file amendments to public filings which are to reflect certain findings of the District Court "among other things," without anywhere indicating what "other things" the District Court had in mind.

The Judgment (A31) orders Parklane to file, and Somekh to cause to be filed, amendments to all public filings filed by Parklane or caused to be filed by Somekh from in or about September, 1974. The Judgment further orders the amendments to reflect "among other things" three findings of the District Court.

By use of the term "among other things," without ever indicating what "other things" the District Court had in mind, the Judgment needlessly places defendants at their peril in attempting properly to comply with the Judgment. In defendants' memorandum in support of their counter-

proposed judgment, this defect in the form of judgment proposed by the SEC was raised before the District Court. Nevertheless, over defendants' objections and without any clarification, the District Court entered the Judgment.

Rule 58, Fed. R. Civ. P., requires that a judgment, set forth on a separate document, be entered upon a decision by the court. One of the reasons for that requirement of Rule 58 is that a party "must be clearly told what it may and may not do" and the appellate court "must be clear as to what the District Court required." Columbus Coated Fabrics v. Industrial Commission of Ohio, 498 F.2d 408, 409 (6th Cir. 1974). That is certainly not the case here.

POINT VI

The Judgment erroneously requires defendants to amend public filings which were not before the District Court.

The Judgment (A31) requires Parklane to file, and Somekh to cause to be filed, with the SEC, amendments to all public filings filed or caused to be filed by Parklane and Somekh from in or about September, 1974. It is respectfully submitted that said requirement is unsupported by the record and, therefore, is improper.

The only public filings of Parklane which were before the District Court, in whole or in part, were the

Proxy Statement (A504) and Note 7 to the Parklane Form 10-K for the year ended September 28, 1974 (A566), entitled "SUBSEQUENT EVENTS". Thus, the District Court's determination could have applied only to the Proxy Statement, or said Form 10-K to the extent of Note 7. This defect in the Judgment was also brought to the District Court's attention by defendants, but ignored by the District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment should be reversed on the grounds (a) that the findings of fact upon which it is based are clearly erroneous and (b) that the purported misrepresentations or non-disclosures found by the District Court are non-existent or irrelevant or immaterial.

Respectfully submitted,

JACOBS PERSINGER & PARKER
Attorneys for Defendants-
Appellants-Appellees
Parklane Hosiery Co., Inc.
and Herbert N. Somekh

IRVING PARKER
JOSEPH N. SALOMON

Of Counsel

Reserve Bank Abandons Plan To Build Tower

By ROBERT E. TOMASSON

The Federal Reserve Bank of New York announced yesterday that it had abandoned plans to build a 42-story office tower adjacent to the bank's headquarters in the financial district.

Paul A. Volcker, president of the bank, said the decision not to build was dictated by rising construction and other costs, which exceed restraints set by the board of governors of the Federal Reserve System.

The decision was termed "a minor disappointment" by Victor Marrero, chairman of the City Planning Commission, who noted that the plan had been given the enthusiastic approval of the commission.

"I just hope it is not a further indication of the disinvestment of some Federal agencies in New York City," Mr. Marrero said.

Plans to build a slender, rectangular tower of glass atop four steel columns 13 stories off the ground on the 23,249-square-foot site bounded by Maiden Lane and Nassau and John Streets were announced just over four years ago.

Changes Made in Plan

In an attempt to stay within a \$60 million construction limit, extensive design changes were announced last May. Chief among them was a plan to use poured concrete instead of glass and steel and to reduce the size of the planned structure.

"But the savings were just not enough," said a spokesman for the bank, the regional arm of the Federal Reserve System.

The structure was to have been used to house about 1,500 of the bank's 4,500 headquarters employees who now work in four different buildings near the main building at 33 Liberty Street.

The site had been occupied by about six commercial buildings, which the bank started buying around 1964. All but one of the structures have been demolished on the half-acre site.

In addition to construction costs, the bank spokesman cited "drastic changes in real estate conditions in the downtown lower Manhattan area that have taken place since the bank began planning the project."

These conditions—an excess of vacant office space and a tenant's market—the spokesman indicated, worked in two ways in favor of the decision not to build.

The bank did not indicate any future plans for the site.

ADDENDUM B

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 78m. Periodical and other reports

(a) Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

§ 78n. Proxies

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Reg. § 240.14a-9. (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

Note: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this rule:

(a) Predictions as to specific future market values or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

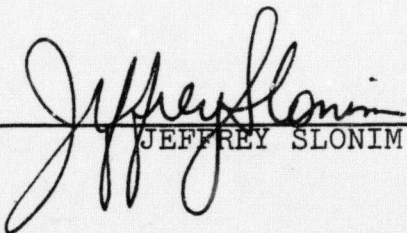
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEFFREY SLONIM, being duly sworn, deposes and
says:

That he is not a party to the action, is over 18
years of age, and resides at 2815 Coyle Street, Brooklyn,
New York; and that on the 2nd day of May, 1977, deponent
served two copies of the annexed Brief upon

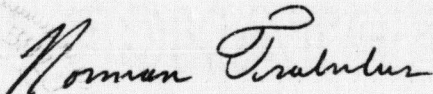
HARVEY L. PITT
General Counsel
Securities and Exchange Commission
at
500 North Capitol Street
Washington, D.C. 20549

the address designated for that purpose, by depositing two
true copies of the same enclosed in a postpaid properly
addressed sealed wrapper in an official depository under
the exclusive care and custody of the United States Postal
Service within the State of New York.



JEFFREY SLONIM

Sworn to before me this
2nd day of May, 1977.



Notary Public

NORMAN TRAEULUS
Notary Public, State of New York
No. 31-4511415
Qualified in New York County
Commission Expires March 30, 1979